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No. 991243 JAN 24 2000

OF THE CLERK

In The
Supreme Court of the United States

OCTOBER TERM, 1999

SALVATORE LOREFICE,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Seventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether intentional, uninvited prosecutorial misconduct in a federal criminal trial requires a more rigorous harmless error analysis: one that assigns more weight to the deliberate nature of the misconduct and less to the strength of the evidence showing guilt.

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PETITION FOR A WRIT OF CERTIORARI

Salvatore Lorefice respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 192 F.3d 647. (App., *infra,* 1a-16a). The relevant oral bench rulings of the district court (App., *infra,* 17a-23a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 16, 1999. A petition for rehearing and suggestion for rehearing *en banc* was denied on October 25, 1999. (App., *infra*, 24a-25a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

1. This petition filed on behalf of Salvatore Lorefice ("Lorefice") raises significant issues regarding the in-court conduct of federal prosecutors and agents. The misconduct reflected in this record, and acknowledged by the Seventh Circuit panel's opinion, is that of government representatives convinced that strong evidence affords them greater freedom to disregard the rights of the accused at trial. Mechanical application of the harmless error rule to cases like this, which involves expressions of a personal opinion as to guilt and improper argument by a prosecutor, encourages prosecutors to presume that even the most fundamental errors are likely to be disregarded where that prosecutor's case is potent. For this reason, Lorefice respectfully suggests that the Court grant his petition and review the decision of the Seventh Circuit.

2. Lorefice was convicted of three counts of wire fraud (18 U.S.C. § 1343) and four counts of mail fraud (18 U.S.C. § 1341) on January 20, 1998, in the U.S. District Court for the Northern District of Illinois. In sum, the Government alleged that Lorefice masterminded a scheme to purchase life insurance policies and file fraudulent benefit claims on the lives of family members and employees of Corporate Travel Consultants ("CTC"), a business owned and operated by Lorefice's wife. During the trial, the Government presented evidence that life

insurance policies were purchased from multiple carriers on the lives of selected family members and employees without their knowledge. It further alleged that Lorefice named himself or a family member as the beneficiary on each of the policies.

3. The first improper incident upon which this petition relies occurred during the rebuttal testimony of F.B.I. Special Agent Ray Ruebenson. Ruebenson, who was the case agent during the investigation and who sat at the prosecutors' table throughout the trial, was making his second appearance as a witness. The ostensible purpose of Agent Ruebenson's rebuttal testimony was to establish that Lorefice was motivated to purchase a paper shredder in order to destroy inculpatory documents. Nothing in the indictment charged destruction of documents, and the Government made no effort to demonstrate that any particular type of document was missing from materials produced by defendant to the grand jury pursuant to subpoena. During the defense case, Lorefice introduced evidence that the travel agency operated by his spouse routinely destroyed large amounts of papers generated in the ordinary course of business.

The Government continued to pursue this uncharged conduct during its rebuttal case. The prosecutor questioned Agent Ruebenson about a pre-indictment meeting he had with Lorefice and his attorney at the prosecutor's office. Apparently intending to demonstrate that Lorefice had knowledge of the Government's suspicions about him, and therefore a motive to destroy documents, the prosecutor asked Agent Ruebenson about the "general nature of the information" revealed to Lorefice during that meeting. Agent Ruebenson responded, "I showed him the insurance documents that I had *and my belief that they were fraudulent.*" App. at 18a (emphasis

supplied). Defense counsel immediately objected and moved for mistrial. His request was denied.

Remarkably, in its brief on appeal the Government confirmed that Agent Ruebenson's comment was not accidental. It was not the product of an unprepared witness or an inartfully broad question from counsel (as the trial court appeared to believe when it denied the request for a mistrial). Rather, the Assistant United States Attorney ("AUSA") asked Agent Ruebenson the question fully intending that his answer would include an expression by the agent about his personal opinion that Mr. Lorefice was guilty of criminal fraud. *See* Gov't Brief on Appeal at 25.

4. The second improper incident occurred during the Government's closing argument, while the AUSA discussed the testimony of defense witness Steven McMullen. McMullen was an attorney retained by Mr. Lorefice in order to assist in collecting a disputed insurance claim against one of the named victims of defendant's scheme, MetLife. On direct examination, McMullen stated that he and Lorefice had decided to not file a lawsuit against MetLife because "we became fearful that [the Government's key cooperating witness] Mr. Lakhani had lied with respect to the insurance information on Mr. Metcalf [the deceased employee whose policy named petitioner as beneficiary]." App. at 5a. At no time did McMullen testify that he had concluded or even suspected that Lorefice was guilty of any improper conduct.

During her closing argument the prosecutor told the jury "[w]ell you know, ladies and gentlemen, that eventually Steve McMullen learned that there was a scheme to defraud, and the defendant was involved." *See* App. at 5a-6a. Defense counsel immediately objected and moved to strike. The prosecutor countered that this was a

proper inference drawn from the evidence. The court responded, "[w]ell, I will overrule the objection, but I will again tell the jury that what McMullen thought isn't the issue here; it is what you think." App. at 23a. McMullen had not testified or intimated that he thought his client Mr. Lorefice had done anything improper, but the prosecutor's comment plainly asserted otherwise and the trial court's limiting instruction failed to repair such harm. The jury presumably would have attached great weight to such an "opinion" held by an attorney privy to his client's secrets, and it plainly was improper for the prosecutor to ascribe that opinion to defendant's counsel. Again, as with the first instance of misconduct discussed above, the error was committed deliberately during closing argument by counsel presenting remarks that were crafted and rehearsed beforehand.

REASONS FOR GRANTING THE PETITION

This petition focuses on a significant issue that Lorefice contends merits reversal of his conviction. At trial, the Government improperly and intentionally asserted before the jury that two witnesses had independently concluded that Lorefice was guilty of the charges brought against him. Notably, the two witnesses in question were those most likely to be credited by the jury: an FBI agent and an attorney who represented Lorefice. Both would have ready access to inadmissible and even privileged information regarding the facts at issue.

The comments made by and about these witnesses were improper and unfair, and the Seventh Circuit panel opinion concluded as much. App. at 7a-8a. The Government has conceded that the Ruebenson statement was intentional, and the improper comments of the prosecutor about the witness McMullen must also have

been purposeful, coming as they did in the course of argument to the jury. The Court of Appeals, however, found that the errors were harmless and thus did not merit reversal under the applicable analysis articulated in *United States v. Rivera*, 153 F.3d 809 (CA7 1998). But the standards set forth in that case are insufficient for purposes of a case like this, which involves deliberate prosecutorial misconduct, and it is appropriate for this Court to set forth a specific set of standards that will address the particular (and recurring) circumstances of this case.

Rivera identifies five factors that must be evaluated to determine whether prosecutorial misconduct was harmless error. These are: (1) the nature and seriousness of the misconduct; (2) whether the conduct of defense counsel invited the prosecutor's remarks; (3) whether the trial court's curative instructions to the jury were adequate; (4) whether the defense was able to counter the improper arguments through rebuttal; and (5) the weight of the evidence against the defendant. 153 F.3d at 814. Applying these standards to the misconduct in this case, the panel determined that the conviction should stand. Those standards, however, are insufficient to protect a defendant's rights in cases involving deliberate prosecutorial misconduct because they give too little weight to the presence of intentional misconduct and too much weight to the sufficiency of the evidence.

The panel characterized the two episodes of error as "isolated instances in a trial otherwise replete with evidence about Lorefice's involvement in the fraudulent scheme." App. at 8a. Although the panel conceded that defense counsel did not invite either erroneous comment, the panel determined that the trial judge's curative instructions were adequate and that defense counsel could have countered the Ruebenson comment in its closing. In sum, the panel

concluded that the errors did "not justify the drastic step of setting aside the result of the trial." *Id.*

Apart from its dubious conclusions about the availability of an effective response by defense counsel at trial to these errors, the opinion of the panel is flawed because it effectively grants to prosecutors in the Seventh Circuit a license during trial to insure a conviction in all but the weakest cases by improper means, to the detriment of the defendant's rights. The incidents in Lorefice's trial described above were themselves clearly improper, as the panel recognized. App. at 7a-8a. But they were more than errors: they fairly may be characterized as instances of deliberate disregard for fundamental notions of fairness. On this record, based on the oral and written comments of the prosecutor, it appears these instances arose because the Government's agents concluded that the strength of their case would insulate the result from reversal no matter how egregious their conduct. The crucial issue before the panel, then, was whether the Government was correct in that perception of near-absolute security. The Government should have been proven wrong, and analysis of the panel's response to this issue demonstrates that it could have the effect of inadvertently encouraging intentional prosecutorial misconduct in future criminal trials.

Two of the factors considered in the lower court's *Rivera* analysis weighed heavily in Lorefice's favor. First, the Government cannot argue that defense counsel invited either comment by the Government's agents; the panel correctly recognized this fact in its opinion. App. at 8a. Second, the episodes were serious and had a complementary effect, likely to cause greater cumulative harm than either could individually. Each came at the end of trial very close in time to the other, just before the jury retired for deliberations. Ruebenson was the last witness

heard by the jury. Coupled with the inherent credibility given by jurors to law enforcement personnel, his status in the jurors' eyes raises a manifest probability that jurors gave undue weight to the improper Ruebenson statement, despite any curative instruction. *Cf. United States v. Young*, 470 U.S. 1, 18-19 (1985) ("The prosecutor's . . . expressing his personal opinion concerning the guilt of the accused pose[s] two dangers: such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence."). McMullen was Lorefice's attorney and the jury was entitled to presume that he therefore had access to privileged information directly related to the charges brought against his client. He was knowledgeable on matters of law and his purported conclusion that his client was engaging in illegal conduct would certainly impress the jurors as persuasive on the question of guilt. As such, the panel's bland description of these events as "isolated incidents" (App. at 8a) undervalues both the significance of the witnesses and the timing of the improper comments by or about those witnesses.

Lorefice likewise had a compelling argument that other of the *Rivera* factors were in his favor. The panel's conclusion that the trial court's curative instructions to the jury were sufficient simply is not supportable. The court's comments to the jury about Ruebenson's expressed opinion of guilt were distressingly brief, simply admonishing the jury that it was to decide the case and was not to consider the opinion of Agent Ruebenson. (Indeed, the panel itself describes it as a "standard curative instruction." App. at

5a.) The trial court's remarks following the McMullen comment easily could have been construed by a jury to imply that the prosecutor had stated the evidence correctly, i.e., that McMullen thought his client guilty, but that the jury should make up its own mind on the issue. In fact, as McMullen had not said anything inculpatory about his client it was error to deliberately inform the jury otherwise, and the trial court's remarks probably exacerbated the damage. In any event, it was certainly error to overrule defense counsel's objection, as the panel conceded. *See* App. at 8a. This Court has acknowledged that curative instructions are not always adequate to remedy an error. *See, e.g., Bruton v. United States*, 391 U.S. 123, 134 (1968). In this instance, considering both the substance of the statements at issue and the point in time in which they were uttered, the fact that brief and ineffective curative instructions were given is not enough to support a finding of harmless error.

For the panel, the fifth factor in the *Rivera* analysis - the weight of the evidence against the defendant - was the dispositive factor. This Court's own experience will demonstrate that in a great number of criminal appeals, the "weight of the evidence" factor is decisive in cases wherein the harmless error rule excuses misconduct at trial. Unfortunately, the panel's opinion here can and will be construed to mean that as a practical matter, *only* the fifth factor is truly important, because where the evidence of guilt seems (on appellate review) to be strong, the nature of the error committed will not matter. Petitioner contends that, whatever the calculus used to assess harmless error in other cases, the dispositive effect assigned to the "weight of the evidence" is not appropriate where the misconduct is intentional on the part of government agents.

This petition shows why a more searching analysis is needed, and why the *Rivera* analysis (or any applicable harmless error analysis utilized by the Courts of Appeal) must distinguish between those comments that might be said to inadvertently result from the "heat of battle" and those that may be fairly characterized as premeditated intentional acts by a prosecutor, uninvited by defense counsel, calculated to insure a conviction. If they are the latter, an analysis grounded primarily on the weight of the evidence does nothing to protect the rights of the accused when the prosecution's case is strong. Such an analysis effectively results in a "sliding scale" of fairness according to the strength of the evidence, notwithstanding the issue of whether the error is an intentional strategy by the Government.

This Court has, on numerous occasions, ruled on the effect of prosecutorial misconduct in a criminal trial. In *Berger v. United States*, 295 U.S. 78 (1935), the seminal case in the area, this Court declared:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a

> wrongful conviction as it is to use every legitimate means to bring about a just one.

195 U.S. at 88. The *Berger* Court concluded that the prejudice in that case was "so highly probable that we are not justified in assuming its nonexistence." *Id.* at 89. Accordingly, it reversed the petitioner's conviction.

In subsequent cases involving prosecutorial misconduct, this Court has consistently condemned the behavior at issue but affirmed the conviction, finding the errors harmless. *See, e.g., Darden v. Wainwright*, 477 U.S. 168 (1986) (holding that improper comments made during prosecutor's closing were invited by defense counsel's summation and were harmless); *United States v. Hasting*, 461 U.S. 499 (1983) (analyzing the applicability of harmless error analysis to a court's supervisory power to reverse a conviction for prosecutorial misconduct); *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974) (habeas review of two comments made during closing argument); *United States v. Young*, 470 U.S. 1 (1985) (utilizing "plain error" analysis). However, dissenting in *Darden*, Justice Blackmun foresaw the situation presented by this petition:

Forty years ago, Judge Jerome N. Frank, in dissent, discussed the Second Circuit's similar approach in language we would do well to remember today:

> "This court has several times used vigorous language in denouncing government counsel for such conduct as that of the [prosecutor] here. But, each time, it has said that, nevertheless, it would not reverse. Such an attitude of helpless piety is, I think, undesirable. It means actual condonation of counsel's alleged offense, coupled with verbal

> disapprobation. If we continue to do nothing practical to prevent such conduct, we should cease to disapprove it. For otherwise it will be as if we declared in effect, `Government attorneys, without fear of reversal, may say just about what they please in addressing juries, for our rules on the subject are pretend-rules. If prosecutors win verdicts as a result of "disapproved" remarks, we will not deprive them of their victories; we will merely go through the form of expressing displeasure. The deprecatory words we use in our opinions on such occasions are purely ceremonial.' Government counsel, employing such tactics, are the kind who, eager to win victories, will gladly pay the small price of a ritualistic verbal spanking. The practice of this court -- recalling the bitter tear shed by the Walrus as he ate the oysters -- breeds a deplorably cynical attitude towards the judiciary" (footnote omitted). *United States v. Antonelli Fireworks Co.*, 155 F.2d 631, 661 (CA2 1946), *cert. denied*, 329 U.S. 742 (1946).

477 U.S. at 205-6 (Blackmun, J., dissenting).

Moreover, the practical effect of decisions like the one in the Court of Appeals is unfortunate and ironic. In similar circumstances, prosecutors will be free to make or elicit improper comments before the jury with little fear that the conviction will be reversed on appeal, so long as they are comfortable that the evidence of guilt seems strong. Where the evidence is weak, prosecutors will learn to be more vigilant about the propriety of their remarks and behavior, so as not to endanger a possible conviction. Prosecutors ought to be accountable for their behavior on a

uniform basis, without regard to the vagaries of a specific trial, such that the rules of fairness that apply to government agents are equally applicable, in all circumstances, in each case. This Court's obligation is to ensure that a trial is not simply correct but also *fair,* and that obligation requires that the strength of a case, the fifth *Rivera* factor in the Seventh Circuit, and one considered in the analysis of each Circuit, be given no greater weight than evidence that the misconduct of Government agents was shown to be intentionally calculated to insure a conviction.

Petitioner is not asking this Court to fashion an analysis of prosecutorial misconduct that focuses solely on punishing overzealous prosecutors rather than protecting the rights of the accused. The fairness of the trial is the touchstone of any analysis utilized by this Court. *See Darden v. Wainwright*, 477 U.S. 168, 182 (1986). However, neither should such an analysis focus completely on the strength of the trial evidence to the near exclusion of all other factors. Such an analysis virtually invites prosecutors to repeat the type of misconduct found in this case. Justice Stevens echoed this concern in his concurrence in *Rose v. Clark*, 478 U.S. 570, 588-89 (1986), when he warned, "[a]n automatic application of harmless-error review in case after case, and for error after error, can only encourage prosecutors to subordinate the interest in respecting the Constitution to the ever-present and always powerful interest in obtaining a conviction in a particular case." This Court should grant this petition in order to discourage prosecutors from fulfilling Justice Stevens' prediction in future criminal trials.

CONCLUSION

The panel's opinion, if left uncorrected, invites federal prosecutors within the Seventh Circuit and others to take steps beyond the duty to seek justice to the detriment of the criminal defendant's fundamental right to a fair trial. Lorefice respectfully suggests that the concept of harmless error should not be extended so as to completely immunize egregious premeditated prosecutorial misconduct when the evidence on balance does not favor the accused. The integrity of the criminal justice system erodes every time a defendant, even a guilty one, is convicted by improper means. This Court has the opportunity to rectify this erosion. For the foregoing reasons, Lorefice respectfully requests that this Court grant his Petition for a Writ of Certiorari and review the decision of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 98-3207

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

SALVATORE LOREFICE, DEFENDANT-APPELLANT

[Argued: January 22, 1999
Decided: September 16, 1999]

Before: EASTERBROOK, KANNE, and DIANE P. WOOD, Circuit Judges.

DIANE P. WOOD, *Circuit Judge.*

Salvatore Lorefice was convicted on federal charges of mail fraud and wire fraud, in violation of 18 U.S.C. §§ 1341 and 1343, for his participation in a particularly unsavory insurance fraud scheme. The scheme involved insuring critically ill individuals under employee group life policies, without their knowledge, and then collecting when they died. On this appeal, he asserts both that his conviction was tainted by trial errors of various kinds and that his sentence was not properly calculated under the Sentencing Guidelines. Although we agree that some errors may have been committed in the trial, we have concluded that none requires reversal; we also find that the district court did not

err in its sentencing determinations. We therefore affirm in all respects.

I

Lorefice and his wife Bonnie owned a travel agency called Corporate Travel Consultants Corporation ("CTC"); Lorefice served as CTC's Chairman of the Board. Noordin Lakhani was the accounting director, Chief Financial Officer, and insurance expert for the company; he reported to Lorefice. From December of 1990, continuing through at least June 1994, Lorefice and Lakhani hatched and carried out a scheme to defraud five different insurance companies: Metropolitan Life Insurance Company ("Metlife"), Mutual Benefit Life Insurance Company ("Mutual"), Royal Maccabees Life Insurance Company ("Royal"), Hartford Life and Accident Insurance Company ("Hartford"), and Benefit Trust Insurance Company ("Trustmark"). The plot involved the purchase of group life insurance policies for persons allegedly employed by CTC. This kind of policy was attractive because group policies usually do not require individual medical examinations as a prerequisite for coverage. The insurance companies instead protected themselves in other ways: to be covered, the person had to be a current, full-time employee, and the policies prohibited "stacking," or the purchase of several policies on the same risk leading to a cumulative level of coverage in excess of that which a single company would underwrite without medical examinations or other, more rigorous scrutiny.

The key to the system Lorefice and Lakhani devised was to find individuals who were critically ill and thus likely to die soon, to list them as employees of CTC, and (unbeknownst to the "insured" individual) to designate Lorefice, his daughters, or in one case Lakhani as the beneficiary of the policy. Certain arrangements were necessary

to accomplish this. First, Lorefice and Lakhani submitted a false census of employees (*i.e.* a list of all full-time employees, with names, titles, and dates of birth) to each insurer. In some instances, people included in the census were not CTC employees at all; in other instances, they were *bona fide* employees, but they did not know that the policies existed. For example, Lorefice made himself the beneficiary on multiple policies for Rosina Lorefice, his mother, age 95; Anna Orofino, his godmother, who was 89; and Joe Lorefice, his brother. None was a current CTC employee. Lorefice also made himself the beneficiary on policies for CTC employees Mabel Barsema, Joel Timmel, and Steve Young, and he made his daughters the beneficiaries on policies for CTC employee Jeffrey Metcalf. None of the "insureds" knew about the coverage. Barsema was over 70 years old and had recently suffered a stroke and a heart attack, while Timmel, Young, and Metcalf were HIV positive. Lakhani was the beneficiary on a policy for his father Akbarali Lakhani, who was not an employee of CTC and who was in poor health. Second, Lorefice and Lakhani took steps to make sure that each insurance company was unaware of the existence of the others.

Two of the individuals covered by these policies (Rosina Lorefice and Jeffrey Metcalf) died before the scheme was discovered. Following their deaths, Lorefice collected $600,000 in death benefits, from Metlife, Mutual, Royal, and Hartford. The plot unwound, however, before anyone else died. On June 12, 1997, a grand jury indicted both Lorefice and Lakhani for four counts of mail fraud and three counts of wire fraud. Lorefice pleaded not guilty and went to trial, at which his theory of defense was that Lakhani, who handled all dealings with the insurance companies, defrauded the insurers without Lorefice's knowledge. For his part, Lakhani, after initially pleading not guilty, changed his plea to guilty on Count One (mail fraud)

and agreed to testify for the government on the eve of trial. The jury returned a verdict of guilty on January 20, 1998; on August 26, 1998, the district court sentenced Lorefice to 57 months' imprisonment, three years' supervised release, and a $50,000 fine, and it ordered that he make restitution in the amount of $600,000.

II

Lorefice presents four arguments for our consideration, three of which relate to his conviction and the last to his sentence. First, he claims that the prosecutors violated his right to a fair trial by improperly asserting that both an F.B.I. agent and Lorefice's own lawyer held the opinion that he was guilty as charged. Second, he argues that the district court improperly redacted two paragraphs from the indictment without resubmitting it to the grand jury, which he believes hampered his defense. Third, he argues that he was deprived of his right to a fair trial when one of the jurors was exposed to a newspaper article implying that Lorefice was implicated in an unrelated corruption probe. Finally, he claims that his sentence should be reduced for two reasons: the district court used an improper figure for "intended loss" under U.S.S.G. § 2F1.1, and the court should have reduced his total offense level by three levels under U.S.S.G. § 2X1.1, the "attempt, solicitation, or conspiracy" guideline. We address these points in turn.

A. *Improper Opinion Evidence*

The most egregious instance of improper opinion evidence, according to Lorefice, occurred when F.B.I. Special Agent Ray Ruebenson was testifying. Agent Ruebenson had been actively involved in the investigation of Lorefice and Lakhani from its inception in June 1994. During the government's case-in-chief, he testified about numerous documents the F.B.I. had subpoenaed. Lorefice then testi-

fied, at which point the prosecutor asked him why he had purchased a paper shredder. Lorefice's explanation was that he had bought the shredder in anticipation of the relocation of CTC's offices. Wanting to rebut this claim, the government called Agent Ruebenson back to the stand, aiming to show that Lorefice had bought the shredder shortly after he learned that the F.B.I. was investigating him, for the purpose of destroying evidence. The government elicited the following testimony from Ruebenson about the meeting during which Lorefice learned of the F.B.I. investigation:

> PROSECUTOR: What was the general nature of the information that you revealed during that meeting to the defendant and his attorney?
>
> AGENT RUEBENSON: I showed him the insurance documents that I had and my belief that they were fraudulent.

Lorefice's lawyer immediately objected and moved to strike. The district court granted the motion to strike and added a standard curative instruction to the jury telling them to disregard the opinion evidence. Later on, Lorefice's lawyer moved for a mistrial based on Ruebenson's testimony, but the district court denied that motion, both because it thought the comment was not prejudicial in light of the rest of the testimony before the jury and because it believed the curative instruction was sufficient.

The second instance of improper opinion evidence occurred during the prosecution's closing argument, when the AUSA alluded to the testimony of defense witness Steven McMullen. Lorefice had hired McMullen, an attorney, to help him obtain death benefits after one of his claims on Metcalf's policy was denied. McMullen testified that he and Lorefice ultimately decided not to file a lawsuit against the company because "we became fearful that Mr. Lakhani had

lied with respect to the insurance information on Mr. Metcalf." This testimony was designed to support Lorefice's contention that he knew nothing about the shady dealings, and that the entire scheme had been masterminded and carried out by Lakhani. At the end of the trial, during her closing argument, the AUSA made the following comment to the jury: "Well, you know, ladies and gentlemen, that eventually Steve McMullen learned there was a scheme to defraud, and the defendant was involved." Again, defense counsel objected promptly, but the court overruled the objection after the AUSA argued that she believed the jury could infer from the fact that no lawsuit was filed that McMullen thought Lorefice was involved in the fraud. The court also took the precaution of instructing the jury that "what McMullen thought isn't the issue here; it is what you think."

This court uses a two-part analysis to assess claims that improper prosecutorial comments have infringed a defendant's right to a fair trial. *United States v. Brisk*, 171 F.3d 514, 524 (7th Cir. 1999); *United States v. McClinton*, 135 F.3d 1178, 1188 (7th Cir. 1998). First, we decide whether the comments were in fact improper. If not, then the claim obviously fails. If they were improper, we ask whether they had the effect of denying the defendant a fair trial. In evaluating the effect of prosecutorial misconduct, there are five factors that we assess, namely, (1) the nature and seriousness of the misconduct; (2) whether the conduct of the defense counsel invited the prosecutor's remarks; (3) whether the trial court's instructions to the jury were adequate; (4) whether the defense was able to counter the improper arguments through rebuttal; and (5) the weight of the evidence against the defendant. See *United States v. Rivera*, 153 F.3d 809, 814 (7th Cir. 1998). Implicit in the five-factor analysis is the recognition that not every trial error requires reversal; under Federal Rule of Criminal Pro-

cedure 52(a), we must disregard "[a]ny error, defect, irregularity or variance which does not affect substantial rights. . . ." Although one of the alleged errors here came from an F.B.I. agent rather than the prosecutor, we find this test appropriate for assessing both claims.

Looking first at Ruebenson's unfortunate comment, we agree with the district court that it crossed the line of propriety and was correctly stricken and made the subject of a curative instruction. This is so because "prosecutorial statements constituting a representation of personal belief as to the defendant's guilt are improper." *United States v. Haddon*, 927 F.2d 942, 947 (7th Cir. 1991). Agent Ruebenson was not the prosecutor, of course, but from a legal standpoint, misconduct by the investigating law enforcement agents is indistinguishable from misconduct by the prosecuting attorneys. See, *e.g.*, *United States ex rel. Smith v. Fairman*, 769 F.2d 386, 391 (7th Cir. 1985) (prosecutor is responsible for failure to produce exculpatory information under the control of the police, even though prosecutor was not aware that the evidence existed); *Wedra v. Thomas*, 671 F.2d 713, 717-18 n.1 (2d Cir. 1982) ("[T]he knowledge of a police officer may be attributable to the prosecutor if the officer acted as an arm of the prosecution."); *cf. Kyles v. Whitley*, 514 U.S. 419, 437 (1995) ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."); *Giglio v. United States*, 405 U.S. 150, 154 (1972) (prosecutor is responsible for nondisclosure of communications between another assistant U.S. attorney and a prosecution witness even if made without the prosecuting attorney's knowledge).

The more difficult question is whether the comment was so deeply prejudicial that counsel's motion for a mistrial should have been granted, or if the district court's ac-

tions were enough under the circumstances to allow this trial to stand. There is no way to read (or hear) Ruebenson's statement about his "belief that [the documents] were fraudulent" as anything but an opinion from a law enforcement officer that the defendant was guilty of the offenses charged, contrary to the rule expressed in *Haddon*.

Although it is a closer call, we also think that the AUSA improperly suggested in her closing argument that McMullen held the opinion that there was a scheme to defraud, and that Lorefice was part of it. First, McMullen had made no such statement; to the contrary, he had expressed concern about Lakhani's truthfulness about Metcalf. Second, the inference that McMullen dropped the suit because he thought Lorefice was guilty is a stretch: McMullen testified that he and Lorefice together decided to drop the suit because they concluded that Lakhani had lied. We agree with Lorefice's contention that the AUSA's statement in effect invited the jury to infer that McMullen, his own lawyer, thought that he was guilty.

Because these statements were improper in the first instance, we turn to the *Rivera* analysis to see whether they were sufficiently prejudicial to deprive Lorefice of a fair trial. In short, they were not. They were two isolated instances in a trial otherwise replete with evidence about Lorefice's involvement in the fraudulent scheme. The trial judge gave prompt and clear instructions to the jury in both instances, and we presume that the jury followed the court's instructions. *McClinton*, 135 F.3d at 1189. Even though defense counsel did not invite either misstep, Lorefice's lawyer could have addressed Agent Ruebenson's comment in closing argument if that had seemed strategically wise. We are satisfied on the record as a whole that these errors were harmless, and thus that they do not justify the drastic step of setting aside the result of the trial.

B. *Redacted Indictment*

Immediately prior to the trial, the district court allowed the government to redact paragraphs 55 and 58 from the indictment, without resubmitting it to the grand jury. Those two paragraphs alleged that Lorefice had written two checks to Lakhani, each in the amount of $20,000, and that Lakhani had deposited the checks in his bank account. In granting the motion to strike, the court accepted the government's explanation that those paragraphs were "mistaken allegations." The prosecutor explained that they had initially believed that the two payments were kickbacks from Lorefice to Lakhani, but later they discovered that the $40,000 represented legitimate commission payments. The court allowed the defense to question Lakhani about the two payments, but it denied defense counsel's request to introduce evidence about the redaction itself because it was "immaterial."

There was nothing wrong in the district court's actions. An indictment may be altered without resubmission to the grand jury as long as the alteration makes no material change and there is no prejudice to the defendant. See *United States v. Mankarious*, 151 F.3d 694, 700 (7th Cir. 1998); *United States v. Graffia*, 120 F.3d 706, 710-11 (7th Cir. 1997). Indeed, in *United States v. Miller*, 471 U.S. 130 (1985), the Supreme Court expressly held that to drop from an indictment allegations that are unnecessary to an offense clearly contained within it does not unconstitutionally amend the indictment. *Id.* at 144, overruling part of *Ex parte Bain*, 121 U.S. 1 (1887). Here, the redaction had the effect of narrowing the indictment. When this is done to an indictment charging a conspiracy or a scheme to defraud, resubmission is not required. *Graffia*, 120 F.3d at 710-11. Furthermore, the deletion of those two paragraphs made no material change in the indictment and even Lorefice is hard

put to find any prejudice from the alteration. If anything, the redaction reduced the burden on Lorefice's defense, because he no longer had to defend against the allegation that he gave kickbacks to Lakhani. There is also no merit to Lorefice's argument that the redaction was a proper subject for exploration at trial. The underlying facts were available to him to use in attacking Lakhani's credibility, insofar as he might have wanted to suggest that Lakhani was lying when he claimed not to have gained financially from the scheme. Evidence about the government's drafting decisions concerning the indictment is not relevant for the jury's consideration, and it is potentially confusing. The district court sensibly prohibited exploration of the redaction at the trial.

C. *Juror Groll*

The next issue on appeal concerns information not introduced into evidence but which, through no misconduct on the part of the prosecution, made its way to one of the jurors from an outside source. The day after Lorefice's trial began, the *Chicago Tribune* ran an article about the proceedings. The article described the opening statements, and, in its final paragraph, it stated, "The charges against Lorefice stemmed from a lengthy corruption probe of former longtime Oakbrook Terrace Mayor Richard Sarallo and developer Robert Krilich." Notwithstanding this journalistic association, the Oakbrook Terrace probe had nothing to do with the case against Lorefice and was not admissible as evidence. Accordingly, the district court polled the jurors to find out if any of them had read the article. Juror Groll replied that he had.

The court thereupon excused the rest of the jurors and questioned Juror Groll individually. The judge first asked him what he recalled about the article, and Juror

Groll responded, "Very little. I scanned it . . . [and] remembered some of the names involved." In response to a follow-up question, Juror Groll explained that he did not learn anything more from the article than he already knew from opening statements. The judge then asked "Is there anything about the article or your recollection of it that would affect your attitude toward the case or toward the merits of the case or toward any of the parties to the case beyond what you had already learned from the opening statements of counsel and whatever evidence had been received." Juror Groll replied that "it could reflect on the final outcome." With this confusing statement on the record, the court probed further, clarifying that Juror Groll had learned nothing more than what he knew from opening statements and that nothing in the article would affect his ability to be a fair and impartial juror.

The court ultimately denied defense counsel's motion to dismiss Juror Groll, for the following reason:

> I don't think there's any prejudice, and I think that the information in the last paragraph is not as damaging as you think, even if he did read it and remembered it. The fact that this investigation grew out of a so-called "corruption probe" doesn't make the case any more damaging against this defendant than it would be if it had arisen out of thin air. The allegations that are made against this defendant in this case are about as damaging as anything can be by way of a fraud investigation.

Last, the court commented about Juror Groll, "What he did was bear out my invariable experience: People read articles and very little of it remains with them. That's what happened. Motion denied." At the request of defense counsel,

the judge instructed Juror Groll not to discuss the article with the other jurors, and there is no allegation that Groll failed to heed this instruction.

We review the district court's decision whether to dismiss a juror on the ground that the juror was exposed to potentially prejudicial influences for abuse of discretion. *Cf. United States v. Berry*, 92 F.3d 597, 600 (7th Cir. 1996) (district court's decision to grant or deny a mistrial on account of prejudice possibly resulting from jury's exposure to information not in evidence is reviewed for abuse of discretion); *United States v. Bruscino*, 687 F.2d 938, 940 (7th Cir. 1982) (*en banc*) (same). Granted, Juror Groll's responses to the court's questions were to a degree contradictory. Nevertheless, the district judge was in the best position to assess what the juror meant, to consider what might have been confusing, and to weigh the juror's ultimate statement that he could be fair and impartial despite having seen the *Tribune* article. See *Berry*, 92 F.3d at 600; *Bruscino*, 687 F.2d at 941. Furthermore, the district court correctly observed that the information in the article about the Oakbrook Terrace corruption investigation paled in comparison with the fraud scheme Lorefice was accused of operating. This is not a case where the outside information suggested that a defendant was engaged in particularly heinous conduct, which might have overshadowed the charges actually before the jury. Under the circumstances, we see no abuse of discretion in the trial court's decision to allow Juror Groll to remain on the jury and to deny defense counsel's motion to dismiss him.

D. *Sentencing*

Mail fraud and wire fraud offenses fall under U.S.S.G. § 2F1.1, which establishes a base offense level of 6, and then requires that level to be increased depending on

the amount of the loss involved. Application Note 8 discusses the way in which loss should be calculated, incorporating by reference the methodology set forth in U.S.S.G. § 2B1.1 (the guideline for larceny, embezzlement, and other forms of theft). That Application Note states that "[a]s in theft cases, loss is the value of the money, property, or services unlawfully taken. . . ." It then explains that "[c]onsistent with the provisions of § 2X1.1 (Attempt, Solicitation, or Conspiracy), if an intended loss that the defendant was attempting to inflict can be determined, this figure will be used if it is greater than the actual loss."

In this case, there are four potential numbers that might be relevant. The actual loss to the insurance companies, everyone agrees, was $600,000, the amount they paid out. The district court decided that the amount of loss Lorefice intended to inflict was $4,200,000, which represents the face value of all the policies he and Lakhani obtained on the lives of Rosina Lorefice, Anna Orofino, Joe Lorefice, Jeffrey Metcalf, Mabel Barsema, Joel Timmel, and Steve Young, the policies on which they had made Lorefice or his daughters beneficiaries. The $4,200,000 therefore does not include the face value of the policy on Lakhani's father, for which Lakhani was the sole beneficiary. Lorefice suggests a third figure, $1,000,000, which is the amount he attempted to collect following the deaths of Rosina Lorefice and Jeffrey Metcalf. He argues that he might never have collected another cent, even if the F.B.I. had not entered the picture, because the other four people might not have died, he might not have been able to complete the claim forms, he might not have used the mails or wires in order to collect, and so on. A fourth possible figure, about which we have no evidence, is the amount of insurance on the entire employee complement, given the fact that these were group policies.

Lorefice concedes that the district court correctly refused to use $600,000 as the amount of loss. If the court had used the $1,000,000 figure, then under § 2F1.1(b)(1)(L), it would have added 11 to the base offense level of 6. Instead, using the $4,200,000 figure, the court added 13 levels to the base level of 6, following § 2F1.1(b)(1)(N). (We note that the government did not argue that the face amount of the policies on the entire employee complement was the proper measure of the intended loss, even though it is clear that the existence of multiple policies alone, regardless of the identity of the beneficiaries, was an act that defrauded the insurance companies. Any argument based on this theory has therefore been waived.) In essence, Lorefice is making an argument about the legal meaning of the term "intended loss," and we therefore review the district court's decision *de novo*. *United States v. Bonanno*, 146 F.3d 502, 508-09 (7th Cir. 1998) ("A district court's calculation of the intended loss under U.S.S.G. § 2F1.1(b)(1) is a finding of fact reviewed for clear error, while its construction of the sentencing guidelines is reviewed de novo.").

When the focus of relevant conduct is on a defendant's intent, rather than her successful execution of a scheme, the fact that it might be difficult for her to carry out a plan is irrelevant. See, *e.g.*, *United States v. Coffman*, 94 F.3d 330, 336-37 (7th Cir. 1996). That is the case with § 2F1.1. See *United States v. Stockheimer*, 157 F.3d 1082, 1090 (7th Cir. 1998). Here, the district court made a fact finding, not clearly erroneous, that Lorefice's actions, including his decision to continue to pay premiums on the policies, show that he intended to collect their face values. The fact that the "insureds" had not yet died makes no difference, because future events that are beyond the defendant's control do not affect his intent. *Bonanno*, 146 F.3d at 510. Although Lorefice relies on the Fifth Circuit's decision in *United States v. Lghodaro*, 967 F.2d 1028 (5th Cir.

1992), for the proposition that the intended loss in an insurance fraud case is the amount the defendant actually sought to claim (here, the $1,000,000), we do not read Lghodaro so narrowly. There, the defendant was arguing that his offense level should have been based on the $9,074.45 he was actually paid, rather than the $58,816.07 for which he filed false claims. Intended loss, he asserted, should be used only if actual loss was difficult to determine. Not surprisingly, the Fifth Circuit rejected that position and held that the full $58,816.07 was the proper amount to use. Nothing in the opinion indicates that the government had argued that the face value of the policies was a more proper measure of intended loss, and thus *Lghodaro* has nothing to say on the latter point.

Last, we consider Lorefice's argument that, even if the district court properly used the $4,200,000 figure as his intended loss, he was guilty of only a "partially completed offense" and thus was entitled to the three-level reduction provided by U.S.S.G. § 2X1.1. One reaches § 2X1.1 via Guideline 2F1.1, Application Note 8, which cross-references the commentary to § 2B1.1. Application Note 2 to § 2B1.1 in turn says that "[i]n the case of a partially completed offense . . . , the offense level is to be determined in accordance with the provisions of § 2X1.1." The problem with this argument is in its initial premise, which is that the mail and wire fraud for which Lorefice was convicted were only partially completed. This court faced an identical argument in *Coffman*, *supra*, where a wire fraud scheme was interrupted before any concrete harm at all had been inflicted. The defendants there argued too that they should be entitled to the adjustment under § 2X1.1, but we disagreed with the following explanation:

> Here the fraud had a real victim in its sights but was interrupted before it could do any harm.

> That makes this a clear case of attempted fraud, where the intended loss is the relevant benchmark rather than the actual loss, by definition zero because it was only an attempt. . . . We add that because the sentence is to be based on the intended rather than the actual loss, the three-level downward adjustment for attempts, § 2X1.1(b)(1), is inapplicable, . . .--wholly apart from the inappropriateness of making such an adjustment when the substantive offense, mail or wire fraud, is a crime of attempting rather than attaining.

Coffman, 94 F.3d at 337 (internal citations omitted). Here too, because the substantive offense was complete with the mail and wire fraud, there was no occasion to apply the downward adjustment of § 2X1.1.

The judgment of the district court is

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, PLAINTIFF,

v.

SALVATORE LOREFICE, DEFENDANT.

No. 97 CR 415
January 20, 1998
10:15 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOHN F. GRADY
AND A JURY

[1295]

* * *

By the PROSECUTOR:

Q. Where did the meeting occur?

By F.B.I. SPECIAL AGENT RAY RUEBENSON:

A. United States Attorney's office.

Q. And you testified that the date was September 21st, 1994?

A. That's correct.

[1296]

Q. What was the general nature of the information that you revealed during that meeting to the defendant and his attorney?

A. I showed him the insurance documents that I had and my belief that they were fraudulent.

Q. When you say that you showed him the insurance documents that you had --

MR. MONICO: Your Honor, may I make a motion to strike that?

THE COURT: Well, I am going to strike --

MR. MONICO: I have a motion to make, your Honor, at the sidebar. I would like to make a motion, your Honor.

THE COURT: This witness' belief that something is fraudulent is not proper for the jury to consider in any event, even for a limited purpose.

MR. MONICO: May I make a motion?

THE COURT: You may. At the next recess you may make a motion. But even for a limited purpose, I am not going to allow that in. So that is stricken, and the jury will disregard that testimony by this agent. What he thinks is absolutely immaterial. You are the ones who will decide this case.

* * *

[1303]

* * *

THE COURT: All right, Mr. Monico, you need not reply.

This incident is a good illustration of the maxim that no matter how hard the Court attempts to conduct a fair trial and a trial free of error, counsel can usually be relied upon to introduce some major issue for appeal. Now, whether this will turn out to be a major or minor issue for appeal, I don't know. I am not the one who will decide that.

Your argument, Miss McClellan, indicates that you have learned nothing from the mistake that you made and nothing from the admonition I gave to the jury or my ruling on the **[1304]** objection. It was quite appropriate and relevant for you to bring out the fact that matters had been called to Mr. Lorefice's attention in regard to a government investigation which would have motivated him to destroy documents relevant to the investigation. That could be done adequately simply by bringing out what I allowed you to do after my ruling on the objection.

Agent Ruebenson testified that he showed documents that are obviously critical to the investigation to Mr. Lorefice and his attorneys, and he wasn't simply wasting time when he did that. He is a paid government employee whose job is to investigate crime. The jury wouldn't know that. Obviously, Mr. Ruebenson thought he smelled a rat or he would not have been there. He didn't have to ask him to state to the jury that, in his opinion, this defendant is guilty of fraud.

PROSECUTOR: Judge, I didn't ask what his --

THE COURT: Don't interrupt me.

PROSECUTOR: I am sorry.

THE COURT: Don't interrupt me. Your interruption demonstrates again that you don't understand what you are doing here.

It is the effect of the evidence that you elicit, not the specific question and answer that is the important thing. This witness told the jury that he thinks this defendant is guilty of fraud. He thought it back in 1994. Here he sits **[1305]** here for two weeks, he hasn't changed his mind.

You will probably do the same thing to the next Judge in the next trial after two weeks of trial because you sure haven't learned anything this morning.

Now, why am I going to deny the motion? I am going to deny the motion because the evidence was no news to the jury. That jury knows that Ruebenson thinks the defendant is guilty. That jury knows that Ruebenson thought the defendant was guilty back in 1994, or at least thought there was a good reason to think he was engaged in a fraud.

After the incidents testified to, a grand jury indictment was returned. Ruebenson has testified in a two-week trial, and he has lined up the witnesses, and he has done a lot of work to forward the prosecution. For this jury not to assume that Ruebenson thinks the defendant is guilty and will be grievously disappointed should the verdict turn out to be not guilty would be naive indeed. The vice of what happened is that the witness made express what is clearly implicit in his very presence in this case.

If I could give you a piece of advice, Miss McClellan, don't be wedded to the idea that the inference to be drawn from the evidence you present is limited to the precise question and answer. The whole concept of circumstantial evidence is based on just the contrary proposition; namely, that you infer things from other things. And the natural inference here was that if **[1306]** Ruebenson told Lorefice that he thought there was a fraud, that is what Ruebenson thinks now and thought then.

Now the question, though, is whether that opinion of Ruebenson has any independent impact upon the thinking of the jury. The instruction I gave them was designed to eliminate any such possibility. My reading of their facial expressions and body language when I gave them the instruction was that they agreed with me 100 percent, that that opinion of Ruebenson, although not offered as such in this trial, was indeed immaterial and something they should not consider.

So I find that there was no prejudice to the defendant, although, Miss McClellan, you have succeeded in raising a substantial issue for appeal in the event that there is a conviction here.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, PLAINTIFF,

v.

SALVATORE LOREFICE, DEFENDANT.

No. 97 CR 415
January 20, 1998
10:15 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOHN F. GRADY
AND A JURY

[1334]

* * *

PROSECUTOR: What does Steve McMullen do, the lawyer for Chubbs and Lloyd's of London? Without checking anything out, he tries to get MetLife to pay the claim. Well, you know, ladies and gentlemen, that eventually Steve McMullen learned that there was a scheme to defraud, and the defendant was involved.

MR. MONICO: I object to that, your Honor. I move to strike.

[1335]

THE COURT: I am going to sustain the last -- well, certainly McMullen didn't say that. Now, the question is whether the jury could infer that from what McMullen did say and the other evidence in the case. But that is the most that can be said for this argument.

Do you take the position, Miss McClellan, that the jury can infer that from the evidence?

PROSECUTOR: Your Honor, I believe they can infer it from the fact that a lawsuit, as I was about to mention, was never filed.

THE COURT: Well, I will overrule the objection, but I will again tell the jury that what McMullen thought isn't the issue here; it is what you think. That is the question.

So I am not even sure why Miss McClellan wants to argue what McMullen thought. But in any case, whether there was fraud here and whether the defendant was intentionally a part of the fraud is entirely a question for you, the jurors, to determine. It is not a question of what somebody else thinks, whether the person testified in the case or not.

All right, proceed.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

No. 98-3207
No. 97-CR-415

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

SALVATORE LOREFICE, DEFENDANT-APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

[October 25, 1999]

BEFORE: HON. FRANK H. EASTERBROOK, Circuit Judge
HON. MICHAEL S. KANNE, Circuit Judge
HON. DIANE P. WOOD, Circuit Judge

ORDER

On consideration of the petition for rehearing and petition for rehearing en banc filed by counsel for the defendant-appellant on September 30, 1999, all members of the original panel have voted to DENY rehearing, and no

active member[1] of the court has requested a vote on rehearing en banc. The petition for rehearing is therefore **DENIED**.

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[1] Circuit Judge Joel M. Flaum took no part in consideration of the petition for rehearing en banc.